IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE R.BASANT

FRIDAY, THE 19TH JANUARY 2007 / 29TH PAUSHA 1928

Crl.MC.No. 3691 of 2006()

CRIME NO.388/06 OF MALA POLICE STATION.
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PETITIONER: COMPLAINANT

SHANAVAS MUHAMMED,
AGED 28 YEARS, S/O.MUHAMMED,
VALIYAVALAPPIL HOUSE, CHAMMANNUR DESOM,
PUNNAYUKULAM VILLAGE, CHAVAKKAD TALUK,
THRISSUR DISTRICT.

BY ADV. SRI.RAJIT
SRI.RANJIT BABU

RESPONDENTS: STATE AND ACCUSED
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1. STATE OF KERALA,
REP. BY PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM.

2. ARJUN JOTHI, S/O.E.V.JOTHI,
EZHUVANPARAMBIL HOUSE,
KURUMBILAVU, THRISSUR DISTRICT.

3. ACHILUS K.S., S/O.SUDHAN K.S.,
KUDILINGAL HOUSE, CHAKRAPADAM P.O.,
PERINJANAM, THRISSUR DISTRICT.

4. HANEESH P.H., S/O.HARSHAN,
PULIPARAMBIL HOUSE, P.O.CHENDRAPPINNI,
THRISSUR.

BY PUBLIC PROSECUTOR SRI. GIKKU JACOB (R1)
SRI.M.K.CHANDRA MOHANDAS (R2 TO R4)

THIS CRIMINAL MISC. CASE HAVING BEEN FINALLY HEARD ON 19/01/2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

R. BASANT, J.

CRL.M.C.NO. 3691 OF 2006

Dated this the 19th day of January, 2007

ORDER

What conditions should be imposed normally in an order granting anticipatory bail under Sec.438 of the Cr.P.C.? Is there any condition which must inevitably be imposed in all such orders granting anticipatory bail? Is the omnibus direction that the accused "if arrested, shall be released on bail on executing a bond" as specified a sufficient and satisfactory condition ordinarily? These questions arise for consideration in this Crl.M.C. where the specific prayer is for cancellation of an order granting anticipatory bail to the respondents who are accused 1, 3 and 5 in a prosecution, inter alia, under Sec.308 of the IPC.

2. To the vital skeletal facts first. The petitioners are 3 of a total of seven accused who face allegations now for the offences punishable under Secs.143, 147, 148, 323, 324, 506 (ii), 326 and 308 read with Sec.149 of the IPC. The de facto complainant along with his sister had allegedly gone to the Holy Grace Academy of Management Studies, Mala. His wife

was a student of that college. The de facto complainant's sister was allegedly insulted. Later, he had gone to the College at 1.30 p.m. on 25/9/06 to give a complaint to the Principal about the misbehaviour of the accused. It is then that the accused persons allegedly assaulted the de facto complainant and others with dangerous weapons. The accused persons have, in turn, a contention that the de facto complainant had gone to the College for not making any complaint; but had gone to the College along with some others with the intention of attacking the persons who, according to him, were allegedly responsible for the earlier incident. Crime was registered. Investigation was in progress.

3. The respondents (accused 1, 3 and 5) had filed an application for anticipatory bail before the learned Sessions Judge and the learned Sessions Judge by the order dated 13/10/06, which is sought to be cancelled in this Crl.M.C., had granted anticipatory bail to the respondents. The operative portion of the order is extracted below:

> "It is hereby directed that in the event of arrest of the petitioners in connection with the above case, they shall be released on bail on executing bonds for Rs.10,000/-

each with 2 sureties to the satisfaction of the officer effecting arrest. The petitioners are directed to appear before the Investigating Officer as and when required."

4. The petitioner – the de facto complainant has come to this Court complaining about the abuse of liberty by the respondents and the consequent need to cancel the order of anticipatory bail granted in their favour. The de facto complainant complains that the accused persons had indulged in contumacious and culpable acts of threatening the petitioner and intimidating him with the intention of interfering with the smooth course of justice. He had allegedly lodged Annexure-A4 complaint before the Sub Inspector of Police. It is, in these circumstances, prayed that the anticipatory bail granted to the respondents may be cancelled.

5. Notice was given to the learned Public Prosecutor. The Sub Inspector of Police has filed a statement. The statement of the Sub Inspector of Police supports the prayer for cancellation of anticipatory bail. The learned Public

Prosecutor, in the course of arguments, only submits that appropriate orders may be passed. She does not specifically support the prayer for cancelation of anticipatory bail. However, the Sub Inspector of Police, in his statement, and the learned Public Prosecutor, in her submissions before this Court, point out that the respondents/accused have not co-operated with the Investigators. They have not so far appeared before the Investigating Officer or the learned Magistrate even after securing the order of anticipatory bail. They are still absconding. All attempts made to arrest them have been futile. Inasmuch as the accused persons are not appearing before the Investigating Officer and are not available for arrest, it is not possible to question the accused persons and record their statements. An effective investigation certainly requires that the accused are questioned and attempts should be made to recover the weapons of offence allegedly used by the alleged offenders. The learned Public Prosecutor prays that appropriate directions may be issued modifying the earlier orders ensuring the presence of the petitioners before

the Investigating Officer. The accused who are granted anticipatory bail must have an obligation to co-operate with the Investigators, submits the learned Public Prosecutor.

6. The learned counsel for the respondents/accused opposes the application vehemently. He submits that the accused were not aggressors; but only victims of aggression. No specific, definite or precise allegations have been raised of any abuse of freedom or interference with the course of justice which can be accepted and acted upon by the court. At any rate, the allegations made are not sufficient; nor have they been established to justify the cancellation of the order of anticipatory bail granted. They are not absconding. They have not been directed to appear before the Investigators. It is not necessary to impose any further conditions on the accused persons, submits the learned counsel for the respondents/accused. They are prepared to co-operate with the investigation.

7. I have anxiously gone through all the relevant inputs. I must say that I am not persuaded to agree that sufficient reasons exist to resort to the extreme and harsh

remedy of law of cancelling the bail and recalling the order granting liberty to the accused persons. It is not necessary to advert to the principles and precedents in detail. In **Tulaseedharan Nair v. State of Kerala** (2006 (4) KLT 471), I have discussed the principles that are applicable when an application for cancellation of bail is considered. Much stricter reasons and circumstances must be shown to exist to justify a prayer for cancellation of bail than while resisting a prayer for grant of bail. I am satisfied that no circumstances do exist justifying the cancellation of bail.

8. But incidentally the question arises as to whether any further conditions need be imposed on the accused persons obliging them to co-operate with the Investigator. It is quite frequently that this Court comes across orders of anticipatory bail granted by the Sessions Judges which reveal mindless and heartless resort to the provisions of Sec.438 of the Cr.P.C. without imposing and insisting on appropriate conditions little realising the difficulties and the prejudice which the Investigating Officers have to suffer on account of such blanket and sweeping orders of

anticipatory bail.

9. It is again not necessary to consider the principles and precedents on the question of grant of anticipatory bail. An order of anticipatory bail virtually converts a non-bailable offence under the Code to a bailable one subject, of course, to appropriate conditions which the court can in the interests of justice impose. The circumstances are not enumerated in detail in Sec.438 of the Cr.P.C. on proof of which such extraordinary equitable discretion can be invoked. The legislature has thought it fit to leave it to the trained intuitions and informed discretion of superior courts to identify the cases where such extraordinary equitable discretion can and ought to be invoked. Such powers are certainly there for the superior courts. But such powers have to be invoked only sparingly and in exceptional cases in aid of justice. Such powers are not to be invoked as a matter of course. Compelling reasons must be shown to exist to justify the invocation of such powers. Without intending to be exhaustive it can certainly be stated that a reasonable apprehension that the powers of arrest vested in

the State and its officials are likely to be abused or misused for oblique or mala fide reasons must be shown to exist before such powers are invoked. Even in cases where legitimate invocation of such powers of arrest would lead to undeserved hardships and prejudice of an exceptional variety to the accused persons such powers can be invoked. Apprehension of torture while in custody of the police is also one circumstance in which such powers can be invoked subject to conditions to enable the accused to surrender before the Judicial Magistrate. In short, it is only in exceptional cases and in the interests of justice that such powers can and ought to be invoked by a court. Even when such powers are invoked, appropriate conditions must be imposed. A reference to Sec.438 of the Cr.P.C. will in this context be of crucial relevance.

> **"438. Direction for grant of bail to person apprehending arrest.--** (1) When any person has reason to believe that he may be arrested on an accusation of having committed a non-bailable offence, he

may apply to the High Court or the Court of Session for a direction under this section; and that Court may, if it thinks fit, direct that in the event of such arrest, he shall be released on bail.

(2) When the High Court or the Court of Session makes a direction under sub-section (1), it may include such conditions in such directions in the light of the facts of the particular case, as it may thinks fit, including--

(i) a condition that the person shall make himself available for interrogation by a police officer as and when required;

(ii) a condition that the person shall not, directly or indirectly, make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any police officer;

(iii) a condition that the person shall not leave India without the previous permission of the Court;

> (iv) such other condition as may be imposed under sub-section (3) of section 437, as if the bail were granted under that section.
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> (3) If such person is thereafter arrested without warrant by an officer in charge of a police station on such accusation, and is prepared either at the time of arrest or at any time while in the custody of such officer to give bail, he shall be released on bail, and if a Magistrate taking cognizance of such offence decides that a warrant should issue in the first instance against that person, he shall issue a bailable warrant in conformity with the direction of the Court under sub-section (1).”
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> (emphasis supplied)

10. Sec.438 of the Cr.P.C. clearly mentions that conditions can be imposed. Four conditions are enumerated in Sec.438(2) of the Cr.P.C. But they are only indicative and not exhaustive. Any other condition as is necessary can also be imposed. The statutory provision as well as the

observations of the Constitution Bench of the Supreme Court in **Gurbaksh Singh v. State of Pubjab** (AIR 1980 S.C. 1632) leave no doubts on this aspect. The decisions in **Salavuddin Abdulsamad Shaik v. State of Maharashtra** (AIR 1996 S.C. 1042); **K.L. Verma v. State and another** (1988 (9) SCC 348); **Nirmal Jeet Kaur v. State of M.P.** (2004 (7) SCC 558); **Sunita Devi v. State of Bihar** (2005 (1) SCC 608) and **Adri Dharan Das v. State of W.B.** ((2005) S.C.C. (Cri.) 933) do show that a condition that the order is limited in time and the accused must within the stipulated period surrender before the Magistrate having jurisdiction and seek regular bail can be imposed. I had considered the question whether an order of anticipatory bail must always be limited by a condition regarding the period of time during which such conditions are remain in force in **Jyothish v. State of Kerala (**ILR 2005 (4) Kerala 220). That question has been considered in detail. It may not be necessary to impose such a condition invariably in all orders, it was held.

11. I am certainly of opinion that when an order of anticipatory bail is granted under Sec.438 of the Cr.P.C. invoking the extraordinary equitable discretion available to the court, there must inevitably be a direction ordinarily that the accused persons should appear before and co-operate with the Investigators. It would be preposterous to leave the Investigating Officer in the lurch even after the grant of an order of anticipatory bail in favour of the accused persons and to expect him to go in search of the accused persons. An obligation to appear before the Investigators and co-operate with the investigation is, according to me, an inevitable condition to be imposed ordinarily at the time of grant of anticipatory bail. Omissions to impose such condition, according to me, would certainly be abdication of the responsibility which a court

exercising powers under Sec.438 of the Cr.P.C. must discharge. One who seeks the extraordinary equitable discretion must certainly in equity be compelled to co-operate with the system in the criminal investigative process.

12. I have no hesitation, in these circumstances, to hold that any order granting anticipatory bail which does not insist and ensure that the alleged offender should appear before the Court or Investigators and make himself available for arrest and interrogation is unreasonable and such a direction should not ordinarily be issued. In an exceptional and rare case if circumstances compellingly warrant that course, the jurisdictional competence of the court to issue such a direction without any condition whatsoever shall of course continue to exist. But ordinarily and normally such conditions must inevitably be imposed which will ensure a proper, fair, efficient and expeditious investigation. Such an investigation is as much the need of the system also in the interests of justice. Such course will be advantageous to the accused also as hearing

the accused and ascertaining his version will be helpful for the proper investigation and to unravel the truth in a criminal investigative process.

13. The impugned orders suffer from the vice that no such condition has been imposed obliging the accused persons to appear before the Investigator and co-operate with the Investigators. I am, in these circumstances, satisfied that a further direction can be issued in the facts and circumstances of this case as requested by the learned Public Prosecutor and the learned counsel for the petitioner.

14. In the result, this Crl.M.C. is allowed in part. The request for cancellation of bail is rejected; but the following directions are issued in the interests of a fair, efficient and expeditious investigation:

(i) The respondents/accused shall appear before the Investigating Officer at 10 a.m. on 9/2/07. They shall make themselves available for interrogation before the Investigating Officer between 10 a.m. and 4 p.m. on 10/2/07, 11/2/07 and 12/2/07. When they so appear before

the Investigating Officer, needless to say that the Investigating Officer shall be at liberty to arrest them with the obligation to comply with the earlier order of anticipatory bail granted by the learned Sessions Judge.

Sd/-

(R. BASANT, JUDGE)

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P.S. to Judge